Burnham v. Superior Court of California: The Final Word On Transient Personal Jurisdiction?

I. INTRODUCTION

It is doubtful that any legal theory has generated more speculation, discussion, and skepticism among American cases and commentators in the 20th century than the theory of transient personal jurisdiction. Whether a state court can, in compliance with the constitutional mandate of due process of law, exercise personal jurisdiction over a nonresident defendant whose only connection with the forum state is having the misfortune of being personally served with process while temporarily or "transitorily" present within the forum, has been the subject of vigorous debate since the enactment of the Fourteenth Amendment in 1868.[1]

The debate that followed the 1977 U.S. Supreme Court decision in *Shaffer v. Heitner*[2] serves as a testimonial that the American legal community was uncertain as to the viability of the rule which some commentators claim traces its roots through colonial America to the English common law.[3] Many commentators have firmly declared that the decisional law of the Supreme Court has abrogated the transient rule,[4] while others have argued that in-state personal service is the most traditional and straightforward method of obtaining personal jurisdiction over any defendant and squarely comports with due process of law.[5] The remaining commentators who have tackled the subject

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[1] *See generally* 1 HENRY C. BLACK, LAW OF JUDGMENTS 276–77 (1891); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 543, 914–15 (1846); Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28 (1986).

[2] 433 U.S. 186 (1977).

[3] *See* STORY, *supra* note 1. *But see* Ehrenzweig, *supra* note 1, at 298.

[4] *See, e.g.*, Daniel O. Bernstine, Shaffer v. Heitner: *A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 VILL. L. REV. 38 (1979); ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS § 2.04(2)(c) (1983); Donald W. Fyr, Shaffer v. Heitner: *The Supreme Court's Latest Last Words on State Court Jurisdiction*, 26 EMORY L.J. 739 (1977); Bruce Posnak, *A Uniform Approach to Judicial Jurisdiction After* World-Wide *and the Abolition of the "Gotcha" Theory*, 30 EMORY L.J. 729 (1981); David H. Vernon, *Single Factor Bases of In Personam Personal Jurisdiction—A Speculation of the Impact of* Shaffer v. Heitner, 1978 WASH. U. L.Q. 273 (1978).

[5] *See, e.g.*, Robert H. Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1 (1982); Jeffrey E. Glen, *An Analysis of "Mere Presence" and Other Traditional Bases of Jurisdiction*, 45 BROOK. L. REV. 607 (1979); Earl M. Matz, *Sovereign Authority, Fairness, and Personal Jurisdiction: The Case for the Doctrine of Transient Jurisdiction*, 66 WASH. U. L.Q. 671 (1988).

appear to reserve judgment, characterizing the conflict as too volatile and uncertain.[6]

The objective of this Note is to survey the cases and comments leading up to the recent Supreme Court decision in *Burnham v. Superior Court of California*[7] that purportedly settles the issue in favor of the continuing vitality of the transient rule of personal jurisdiction. In addition to analyzing the *Burnham* decision, this Note will explore the rationale buttressing the decision and arguments against its outcome. A thorough summary of the Supreme Court decisions leading up to *Burnham*, as well as a careful examination of their impact on the transient jurisdiction controversy, will be provided. Furthermore, analysis, ranging from thoughtful speculation to well-grounded theories, concerning the fairness of the transient rule, the probable effects the *Burnham* decision will have on the future of personal jursdiction jurisprudence, and the emerging importance of judicially created doctrines such as forum non conveniens, will be presented. Finally, an attempt will be made to assess the impact of *Burnham* toward answering the question: Is *Burnham* the "final word" on transient personal jurisdiction?

II. THE IDEAL FACT PATTERN OF *BURNHAM*

It all began simply enough. Dennis and Francie Burnham, two New Jersey residents, came to a mutual conclusion that it was time for their marriage of 11 years to come to an end. It was agreed that Francie, who intended to move to California, should file for divorce on grounds of "irreconcilable differences" and retain custody of the couples' two children. However, Dennis later became dissuaded that their "agreement" was the best course of action. Subsequently, Mr. Burnham filed for divorce in New Jersey state court on the grounds of "desertion." Meanwhile, Mrs. Burnham, unaware that the New Jersey suit was pending, filed for divorce in California state court pursuant to the agreement.

Shortly after Mrs. Burnham filed for divorce, Mr. Burnham travelled to Southern California on business. Upon completion of his business, Mr. Burnham decided to drive north to the San Francisco Bay area to visit with his children who were living with Mrs. Burnham. He took his oldest child to San Francisco for the weekend. Upon returning his child to Mrs. Burnham's home, Mr. Burnham was met by Mrs. Burnham's attorney who promptly served him with a California court summons and a copy of his wife's divorce petition. Mr. Burnham, with summons in hand, thereafter boarded a plane and returned to New Jersey.

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[6] Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77 (1980).

[7] 495 U.S. 604 (1990).

Mr. Burnham made a special appearance in California state court, moving to quash the service of process on the ground that the court lacked personal jurisdiction. He argued that because he was a nonresident and his only contacts with the State of California were a few short business trips and the one trip to visit his children, he lacked any substantial "minimum contacts" with the forum. In essence, Mr. Burnham argued that a court could not, consistent with the Due Process Clause of the Fourteenth Amendment, establish personal jurisdiction over a nonresident defendant based solely on in-state personal service of process. Mr. Burnham maintained that transient personal jurisdiction no longer comported with due process.

The Superior Court denied the motion, and the California Court of Appeal denied mandamus relief, rejecting Burnham's "minimum contacts," due process argument. The Superior Court held it to be "a valid jurisdictional predicate for *in personam* jurisdiction" that the "defendant [was] present in the forum state and personally served with process."[8]

For the first time, the U.S. Supreme Court agreed to squarely confront and resolve the controversy surrounding the doctrine of transient personal jurisdiction.[9] Based in part upon conflicting lower court decisions and upon the heated debate following *Shaffer*, the Court granted certiorari to settle the matter.[10]

Before discussing the role that the *Burnham* decision plays in the transient jurisdiction fray, a generalized discussion of personal jurisdiction jurisprudence is in order. The following sections survey the historical development of judicial jurisdiction, the mechanics of personal jurisdiction, and the inherent due process considerations.

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[8] Appellant's Petition for Certiorari at 5, Burnham v. Superior Court of California, 495 U.S. 604 (1990). *See also* 110 S.Ct. at 2109.

[9] Part of the confusion surrounding the doctrine of transient in personam jurisdiction can be contributed to the absence of a Supreme Court decision that directly addressed the issue. *See generally* RESTATEMENT (SECOND) OF JUDGMENTS § 8 cmt. a (Tent. Draft No. 5, 1978). Almost all Supreme Court decisions involving in personam jurisdiction over nonresident defendants also involved out-of-state service of process. It appears that *Burnham* was the first case granted certiorari upon which personal jurisdiction over a nonresident was grounded solely upon in-state service of process.

[10] 493 U.S. 807 (1989).

III. THE FUNDAMENTALS OF PERSONAL JURISDICTION

A. *The Historical Development of Personal Jurisdiction: The American Experience*

The proposition that the judgment of a court lacking jurisdiction is void can be traced to 15th century English common law antecedents.[11] As early as 1814, American courts honored this common law rule and implanted the idea of judicial jurisdiction into the American legal system.[12] Many decades before the Fourteenth Amendment was added to the Constitution, American courts held that the judgments of courts lacking jurisdiction over the cause of action were void and unenforceable.[13]

In 1868, a new element was added to the judicial jurisdiction analysis with the adoption of the Fourteenth Amendment. Specifically, the Fourteenth Amendment's Due Process Clause mandates that no person may be denied "life, liberty or property without due process of law."[14] Initially applied to jurisdiction over the cause of action,[15] the Supreme Court in 1878 announced that the judgment of a court lacking personal jurisdiction also violated the Due Proces Clause of the Fourteenth Amendment.[16] Since *Pennoyer v. Neff*,[17] all state court assertions of personal jurisdiction must comport with due process of law.

B. Pennoyer v. Neff: *A Benchmark for Personal Jurisdiction and Due Process*

Every discussion of personal jurisdiction must begin with the landmark Supreme Court decision in *Pennoyer v. Neff*. With *Pennoyer*, the Court spelled out the due process requirements of the Fourteenth Amendment with respect to

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[11] *See, e.g.*, Bowser v. Collins, 145 Eng. Rep. 97 (1482).

[12] *See, e.g.*, Grumon v. Raymond, 1 Conn. 40, 45 (1814).

[13] *See, e.g.*, Picquet v. Swan, 19 F. Cas. 609 (no. 11, 134) (CC Mass. 1828); Dunn v. Dunn, 4 Paige 425 (N.Y. Ch. 1834); Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336 (1850).

[14] U.S. CONST. amend. XIV.

[15] Jurisdiction over the cause of action is commonly known as subject matter jurisdiction. Jurisdiction over the parties to the cause of action, or personal jurisdiction, is a separate consideration under American law. Early English decisions collapsed the two notions into the theory of judicial jurisdiction or coram judice ("before a judge"). According to 18th century English common law, jurisdiction over the cause of action was the beginning and the end of the inquiry. Jurisdiction was proper wherever the defendant could be found. *See* STORY, *supra* note 1, at § 543, 914–15.

[16] Pennoyer v. Neff, 95 U.S. 714, 732 (1878).

[17] *Id.*

personal jurisdiction, to wit "proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute [Fourteenth Amendment] due process of law."[18] It follows that decisions rendered by a court without jurisdiction violate due process and are therefore void and without effect. According to the Court, the traditional method of obtaining jurisdiction over a nonresident defendant consisted of personal service of process upon the defendant within the boundaries of the forum state.[19]

It must be noted that the *Pennoyer* Court adopted a sovereignty or "power" approach to jurisdiction. Each state was considered a sovereign unit and had the "power" to exercise jurisdiction over all persons and property within its boundaries. As a consequence, "the tribunals of one State [had] no jurisdiction over persons beyond its limits."[20] Furthermore, the Court held that "[p]rocess from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them."[21] Therefore, after *Pennoyer*, each state had the "power" to exercise in personam jurisdiction[22] over any defendant, resident or nonresident, who was personally served with process while present in the state. Furthermore, each state had the "power" to exercise in rem jurisdiction over any property within the state. A state, however, had no "power" to adjudicate a claim against a nonresident concerning personal rights and obligations if the nonresident could not be served in the state. Such a proceeding would violate due process and usurp the "power" of the state in which the defendant could be served.[23]

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[18] *Id.* at 733 (due process defined as "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights").

[19] *Id.* at 733. It appears that the Court believed due process to *require* in-state service. When a suit involved the personal liability of a nonresident, as opposed to a determination concerning property located within the forum state, the Court ruled that due process requires that the defendant be served in states or submit to a voluntary (presumably general) appearance. The exercise of personal jurisdiction via long-arm statutes and out-of-state service procedures were not respected by the Court in the *Pennoyer*-era.

[20] *Id.* at 731.

[21] *Id.* at 727.

[22] In personam jurisdiction, or jurisdiction over the person, is one of several types of personal jurisdiction and gives a court power to issue a judgment against a defendant personally. In rem jurisdiction, or jurisdiction over a thing, is yet another type of personal jurisdiction and gives a court power to adjudicate a claim concerning a piece of property or about a status. Finally, quasi in rem jurisdiction, concerns an adjudication as to the interests of specific individuals in a piece of property. Jurisdiction is exercised by attaching the property as a pretext to reaching the interests of individuals in the property. For a discussion of the various types of personal jurisdiction *see*, Bernstine, *supra* note 4. *See also* Shaffer v. Heitner, 433 U.S. 186, 199 (1977).

[23] *Pennoyer*, 95 U.S. at 727, 729.

C. International Shoe: *The Abrogation of the Power Theory of Personal Jurisdiction*

Following *Pennoyer*, courts subscribed to the "power" rationale as a guide to exercising personal jurisdiction over nonresident defendants.[24] States could exercise jurisdiction upon any defendant who had the misfortune of being served while present in the state where an action had been brought. The fortunate defendants were those nonresidents who could not be found within the forum state, for it was those defendants the court could not reach. Service of process across state lines violated due process because it usurped the sovereign "power" of other states. Consequently, any resulting decision was rendered void and unenforceable. Understandably, an abyss developed into which the rights of plaintiffs seeking to bring suit against nonresident defendants periodically disappeared. If the nonresident could not be personally served while present in the forum and, in addition, owned no property in the forum over which the plaintiff could exercise jurisdiction, then the nonresident was essentially protected against being sued in the forum.[25]

As the "power" theory became increasingly disfavored by the states in the early 20th century,[26] changes in transportation and communication technology, accompanied by the tremendous growth of interstate commerce, led to an "inevitable relaxation of the strict limits on state jurisdiction" over nonresidents.[27] States began to develop substitute service of process methods to reach nonresidents and hale them into the forum state.[28] Finally, the Supreme Court announced the demise of the "power" theory of *Pennoyer* in *International Shoe Co. v. Washington*:

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[24] *See generally* Ehrenzweig, *supra* note 1. Professor Ehrenzweig cites the RESTATEMENT, CONFLICT OF LAWS §§ 77–78 (1934) as the general rule prevailing in American jurisdictions at the time of *International Shoe*: "transitory actions" may be brought in any court that has jurisdiction of the defendant, and anyone "personally present" in the state is subject to its jurisdiction, "whether he is permanently or only temporarily there."

[25] *See* Hanson v. Denckla, 357 U.S. 235 (1958) (Black, J., dissenting).

[26] *See, e.g.*, Kane v. New Jersey, 242 U.S. 160 (1916); Hess v. Pawloski, 274 U.S. 352 (1927). Following *Pennoyer*, states became disgruntled by the fact that they could not reach the nonresident motorist who, after causing injury within the forum, simply drove beyond the jurisdictional boundaries of the state to prevent in-state service. Therefore, the Court was inclined to abandon the unworkable "power" theory and restate the due process requirements to incorporate out-of-state service upon nonresidents.

[27] *Hanson*, 357 U.S at 260.

[28] *See* Hess v. Pawloski, 274 U.S. 352 (1916) (nonresident motorists act subjected nonresidents to jurisdiction of Massachusetts under implied consent theory).

> Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. But now that the *capias ad respondendum*[29] has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, *if* he be *not present* within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[30]

Although *International Shoe* signaled the end of the "power" theory, it did not render *Pennoyer* completely inoperative. Notice that the above quoted language appears to exempt transient jurisdiction from the minimum contacts standard. Under a strict interpretation of this language, exercise of in personam jurisdiction over any defendant served while "present within the territory of the forum" would not be required to surmount the "minimum contacts" inquiry. However, such a close reading appears to be counterintuitive given the Court's emphasis on "traditional notions of fair play and substantial justice."[31] For example, the Court restates the "fair play and substantial justice" principle in more sweeping terms at the close of the *International Shoe* opinion:

> Whether due process is satisfied *must* depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause *does not contemplate* that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the State has no contacts, ties, or relations.[32]

Thus, a controversy as to the continuing validity of *Pennoyer* was born. Reading the literal language of the decision results in conflicting outcomes. At first glance, it appears the Court intended the "minimum contacts" standard to play no role in exercising personal jurisdiction over the nonresident who is personally served within the forum state.[33] Upon further reading, one must ponder whether the Court intended the "minimum contacts" standard to govern the entire area surrounding the exercise of state court jurisdiction over

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[29] *Capias ad respondendum* refers to a judicial writ by which actions at law were frequently commenced; and which commands the sheriff to *take* and hold the defendant until the day of trial to answer to the plaintiff's complaint. BLACKS LAW DICTIONARY 188 (5th ed. 1979).

[30] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940) (emphasis added)).

[31] *Id.*

[32] 326 U.S. at 319 (1945).

[33] *See supra* note 30.

nonresident defendants given the "fairness" requirements of Fourteenth Amendment due process.

Perhaps the best technique for appraising the impact of the *International Shoe* decision is to examine the decisions that were handed down in subsequent years. One cannot get a true grasp of the importance of the controversy that followed the decision without searching the decisions attempting to apply the new "minimum contacts" standard. Furthermore, it is only by examining the ensuing case law that one can begin to distill the enduring rule of *International Shoe*.

D. *Due Process Decisions Following in the Wake of* International Shoe

With the due process decisions that followed in the wake of *International Shoe*, the Supreme Court concerned itself with focusing upon, and refining the effect of, the minimum contacts rule. As the states became increasingly creative in extending the jurisdiction of their courts to nonresident defendants that could not be physically served within the state, the boundaries of due process became obfuscated.[34] As a result, the preoccupation with the extremes of personal jurisdiction and due process shifted the focus from traditional methods (i.e. personal in-state service) to ruling upon the validity of the various long-arm procedures. Therefore, paramount significance was given to the application of the "minimum contacts" standard.

An illustration of this phenomenon can be drawn from the Court's decision in *Hanson v. Denckla*.[35] The Court ruled that: "However minimal the burden of defending in a foreign tribunal, a defendant may *not* be called upon to do so unless he has had the "minimum contacts" with that State that are a *prerequisite* to its exercise of power over him."[36] In support of this proposition, the Court cited *International Shoe*.[37] As mentioned above, however, the decisions that followed *International Shoe* were concerned almost exclusively with the validity of out-of-state service procedures and not those methods by which the nonresident was served in-state. Furthermore, the post-*International Shoe* decisions typically concerned jurisdiction over nonresident

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[34] *See, e.g.*, McGee v. Intenational Life Ins. Co., 35 U.S. 220 (1957); Hanson v. Denckla, 357 U.S. 235 (1958); Kulko v. Superior Court, 436 U.S. 84 (1978).

[35] 357 U.S. 235 (1958).

[36] *Id.* at 251.

[37] *International Shoe*, 326 U.S. at 319. It should be noted that the Court referred to the "sweeping" language that makes no exemption for those defendants personally served in-state ("[The due process clause] does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations"). The question remains whether in-state service serves as a sufficient contact.

corporate defendants as opposed to individuals.[38] Therefore, these decisions provide negligible insight into the true impact of *International Shoe* and the "minimum contacts" test of due process upon the continuing validity of transient personal jursdiction.

E. Shaffer v. Heitner: *The Demise of* Pennoyer?

As mentioned above, States scrambled in the wake of *International Shoe* to enact long-arm statutes providing for substitute service of process[39] over nonresident defendants who neither owned property, nor could be personally served, within the state. Decisions following *International Shoe* derived from its standard the general rule that states could dispense with in-state personal service on nonresident defendants in suits arising out of their activities, or "minimum contacts," within the State.[40] Confusion over the continued vitality of *Pennoyer*'s in-state service and in rem jurisdiction rules, however, persisted. The culmination of this confusion resulted in the Supreme Court's decision in *Shaffer v. Heitner*.[41]

In *Shaffer*, a plaintiff filed a shareholder's derivative suit in Delaware against, inter alia, twenty-eight present and former corporate directors of Greyhound Corp., a business incorporated under the laws of Delaware.[42] Plaintiff filed a motion to sequester stock of the Delaware corporation owned by the defendants.[43] Under Delaware law, the situs of any stock issued from any Delaware corporation was regarded as within the State of Delaware.[44] In essence, the plaintiff sought to establish personal jurisdiction over the nonresident defendants in the Delaware state court by seizing the property of the nonresidents located within the state. The suit was brought as a quasi in rem proceeding based on attachment or seizure of property present in the jurisdiction so that a court may exercise jurisdiction over the interests of specific individuals in the property. The suit did not concern the property, but

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[38] *See supra* note 35 and accompanying text.

[39] Substitute service of process is any service other than personal service upon the defendant. The term includes service by mail or publication. The typical long-arm statute provides for out of state service of process upon nonresident defendants that have sufficient contacts with the forum state so that the exercise of personal jurisdiction complies with the rule spelled out in *International Shoe* and due process. For an example of the application of long-arm statutes and due process analysis, *see, e.g.*, Gray v. American Radiator Corp., 176 N.E.2d 761 (Ill. 1961).

[40] *See generally* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414–15 (1984).

[41] 433 U.S. 186 (1977).

[42] *Id.* at 189.

[43] *Id.* at 192.

[44] DEL. CODE ANN., tit. 8, § 169 (1975).

the property served merely as a pretext to exercising in personam jurisdiction over the nonresident defendants.[45] The success or failure of the plaintiff's quasi in rem theory of jurisdiction depended in part upon the Court's acceptance of the continuing validity of *Pennoyer*'s presence of property rationale.[46] Unfortunately for the plaintiff, the Court refused to uphold the exercise of quasi in rem jurisdiction.

The Court mounted a serious assault on the continuing application of *Pennoyer* when it stated that "[it] is clear, therefore, that the law of state-court jurisdiction no longer stands securely on the foundation established in *Pennoyer*."[47] In this vein, the Court ruled that the "relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the State on which the rules of *Pennoyer* rest, [has become] the central concern of the inquiry into personal jurisdiction."[48] In support of this conclusion, the Court recited the sweeping language of the *International Shoe* decision that suggests the exercise of jurisdiction over the nonresident cannot comport with due process when the nonresident "has no contacts, ties, or relations" with the forum.[49]

Perhaps the most critical announcement of the Court in *Shaffer* was that the "standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum-contacts standard elucidated in *International Shoe*."[50] Finally, the Court announced that "*all* assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[51] This oft-quoted rule can be analogized to the destruction of the last remaining flood gate that kept the surge of controversy concerning transient personal jurisdiction at bay.

Many commentators[52] and a few lower courts[53] (and most likely a slew of law professors) haled *Shaffer* as mandating the death of transient jurisdiction.

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[45] *Shaffer*, 433 U.S. at 196–97. As to the relationship among the various types of personal jurisdiction, see *supra* note 23.

[46] Pennoyer v. Neff, 95 U.S. 714, 723 (1878) ("the exercise of the jurisdiction which every State is admitted to possess over persons and property within its own territory will often affect persons and property without it").

[47] *Shaffer*, 433 U.S. at 206.

[48] *Id.* at 204.

[49] *Id.* (quoting *International Shoe*, 326 U.S. at 319).

[50] *Id.* at 207.

[51] *Id.* at 212. In a footnote to the quoted language, the Court stated that it would not be "fruitful" to determine whether jurisdiction might have been sustained under the *Shaffer* standard in cases decided on the rationale of *Pennoyer*. Furthermore, the Court stated that "[to] the extent that prior decisions are inconsistent with this standard, they are overruled." *Id.* at 212, n. 39.

[52] *See supra* notes 1–5. *See also* Frank R. Lacy, *Personal Jurisdiction and Service of Summons After* Shaffer v. Heitner, 57 OR. L. REV. 505 (1978).

This conclusion cannot be based on the specific facts of *Shaffer* because transient jurisdiction was not an issue. In addition, such a conclusion cannot be based upon careful reading of *Shaffer* purporting to apply the *International Shoe* standard to all exercises of state court jurisdiction. As stated above, the *International Shoe* Court specifically exempted in-state service of process from the "minimum contacts" standard.[54] What most commentators base this conclusion upon is not so much a literal reading of *Shaffer*, but a reading as to what the *Shaffer* rationale stands for and its place among the modern "trend" of Supreme Court jurisdiction decisions.[55]

Shaffer is a critical decision in that it represents what most commentators regard as the fall of the last remaining vestige of *Pennoyer*. Critics of the continuing validity of transient jurisdiction believe that *International Shoe* destroyed the "power" rule of *Pennoyer*. In addition, these same commentators believe that *Shaffer* destroyed the "presence" doctrine of *Pennoyer*.[56] Such is the basic argument of Mr. Burnham in the subject case of this Note. The sections that follow discuss the issues raised by Burnham's argument and the support that such an argument enjoys. In addition, the decision of the Court will be discussed from the perspective of Justice Scalia, the author of the plurality opinion.

IV. THE CONTINUING VALIDITY OF *PENNOYER* AND TRANSIENT PERSONAL JURISDICTION

A. *Hearing Without Listening: The Argument Against the Continuing Validity of Transient Personal Jurisdiction*

It was upon the Court's due process decisions discussed above that Burnham rested his argument that mere service of process upon a nonresident defendant while temporarily present in the forum state was an insufficient basis for the exercise of personal jurisdiction consistent with the Fourteenth Amendment.[57] Burnham traced the Court's decisional law from *Pennoyer* to *International Shoe*, culminating in *Shaffer* for the proposition that "all assertions of state court jurisdiction must be evaluated by the standard set forth in *International Shoe* and its progeny."[58] Burnham argued that in the absence

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[53] *See, e.g.*, Nehemiah v. Athletics Congress, 765 F.2d 42 (1985); Harold Pitman Co. v. Typecraft Software, 626 F. Supp. 305 (1986); Schreiber v. Allis-Chalmers Corp., 448 F. Supp. 1079 (1978); Bershaw v. Sarbacher, 40 Wash. App. 653 (1985).

[54] *See supra* note 30 and accompanying text.

[55] *See* CASAD, *supra* note 4, at § 2.05.

[56] *See supra* note 52 and accompanying text.

[57] *See* Brief for Petitioner at 16, Burnham v. Superior Court of Cal., 495 U.S. 604 (1990).

[58] *See supra* note 52 and accompanying text.

of "continuous and systematic" contacts with the forum, a nonresident defendant can be subjected to judgments only as to matters that arise out of or relate to his or her contacts with the state.[59]

Justice Scalia, writing for the plurality, stated that Burnham's argument rested upon a "thorough misunderstanding of our cases."[60] It is apparent from the commentators and lower court opinions cited throughout this Note that Burnham was not alone in laboring under such a "thorough misunderstanding."[61]

B. *The Propagation of the "Thorough Misunderstanding" Regarding Transient Jurisdiction*

The *Burnham* plurality more than suggests that the debate concerning the continued vitality of transient jurisdiction constitutes an unavailing exercise in academic gymnastics. In this vein, the Court states that it has no knowledge of "a single state or federal statute, or a single judicial decision resting upon state law, that has abandoned in-state service as a basis of jurisdiction."[62] Of the decisions that have pronounced the death of transient jurisdiction on the basis that the Court's due process decisions render the practice unconstitutional, the Court states that the decisions should be disregarded as erroneous.[63] Finally, Scalia states that the proposition that in-state service on a nonresident defendant is insufficient to confer personal jurisdiction over the defendant is "unfaithful to both elementary logic and the foundations of our due process jurisprudence."[64]

Taken as a whole, these strong statements of "black letter" beg the question that is the heart of this Note. At what point did the "thorough misunderstanding" concerning the questionable validity of the transient jurisdiction rule arise? If the doctrine is so assuredly sufficient under the rules spelled out in the Court's due process decisions, then why has the transient rule been the subject of such heated debate? It is apparent that a chronological re-evaluation of the evolutionary path of Supreme Court due process decisional law, as related to transient jurisdiction, is in order. Fortunately, Justice Scalia provides a guided tour of this path in the *Burnham* decision.

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[59] *Burnham*, 495 U.S. at 610 (quoting *Helicopteros*, 466 U.S. at 414).

[60] *Id.*

[61] *See supra* notes 54–55 and accompanying text.

[62] 495 U.S. at 615. The Court cited several recent cases that reaffirm the doctrine of transient jurisdiction, including Oxman's Erwin Meat Co. v. Blacketer, 273 N.W.2d 285 (Wis. 1979); Lockert v. Breedlove, 361 S.E.2d 581 (N.C. 1987); El-Maksoud v. El-Maksoud, 568 A.2d 140 (N.J. Super. 1989).

[63] 495 U.S. at 615.

[64] *Id.* at 619.

C. Pennoyer *Revisited*

Recall that at the time of *Pennoyer*, presence of a party litigant (for present purposes, the nonresident defendant) was an unequivocal prerequisite to the exercise of in personam jurisdiction by a state court. States were sovereign entities and had "power" to exercise jurisdiction over any person or thing located within the state. Hence, the transient rule of personal jurisdiction was "among the most firmly established principles of personal jurisdiction in American tradition."[65]

Scalia points out that "not one American case from the period [of the Fourteenth Amendment] (or not one American case until 1978) held, or even suggested, that in-state personal service on an individual was insufficient to confer personal jurisdiction."[66] Therefore, a nonresident defendant would be well advised, at least during the late 19th and early 20th centuries, to avoid being served while passing through the state in which a summons could be waiting.

D. International Shoe *and Its Progeny Revisited*

Most commentators who argue for the extinction of transient jurisdiction trace the foundations for their arguments to *International Shoe*.[67] The Court, there, made the first significant inroads upon the time-honored doctrines of *Pennoyer*. It was held that presence or consent were not necessarily required by due process for a court to exercise personal jurisdiction over a nonresident. States were no longer required to adhere to the unbending territorial limits on jurisdiction set forth in *Pennoyer*.[68] The Court announced a new standard for the exercise of in personam jurisdiction over nonresident defendants. State courts could exercise jurisdiction over nonresidents, whether served while present in the forum or not, provided the nonresident had "certain minimum contacts" with the forum "such that the maintenance of the suit does not offend

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[65] *Id.* at 610. The early American traditional view provided that each state has the power to exercise jurisdiction over any individual who could be found within its borders, and that once having acquired jurisdiction over such a person by properly serving him with process, the state could retain jurisdiction no matter how temporary the defendant's visit might be. *See generally*, Potter v. Allin, 2 Root 63 (Conn. 1793); Barrel v. Benjamin, 15 Mass. 354 (1819).

[66] 495 U.S. at 613. Commentators were also in seemingly unanimous agreement on the point. *See, e.g.*, 1 HENRY C. BLACK, LAW OF JUDGMENTS § 276–77 (1891); 1 ABRAHAM C. FREEMAN, LAW OF JUDGMENTS § 470–71 (1873); RESTATEMENT OF CONFLICT OF LAWS, §§ 77–78 (1934).

[67] *See* Ehrenzweig, *supra* note 24.

[68] *See* supra note 29 and accompanying text.

traditional notions of fair play and substantial justice."[69] It would appear that due process required that the "minimum contacts" test be surmounted. It is with this misstatement of the *International Shoe* rule that the "thorough misunderstanding" was conceived.[70]

Scalia points out that "nothing in *International Shoe* or the cases that have followed it [suggests] . . . that a defendant's presence in the forum . . . is itself no longer sufficient to establish jurisdiction."[71] The reasoning behind such a bold and unqualified statement results from Scalia's meticulous reading of the *International Shoe* decision. First, the minimum contacts standard enunciated in *International Shoe* expressly exempts in-state service of process upon nonresident defendants from its operation.[72] Second, the issue of transient jurisdiction was not addressed in *International Shoe*. There, the Court was dealing with the measures required to support "novel procedures" for the exercise of personal jurisdiction over the nonresident defendant. Specifically, the Court was addressing the due process considerations inherent in exercising in personam jurisdiction over nonresidents who could not be served within the state.[73] Third, *International Shoe* concerned the exercise of personal jurisdiction over a nonresident corporation, not the individual (although the standard announced treats both types of defendants similarly). Finally, as Scalia points out, jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of the American legal system that defines the due process standard of "traditional notions of fair play and substantial justice." That standard was developed by analogy to "physical presence," and it would be "perverse" to say it could now be turned against that "touchstone of jurisdiction."[74]

The major importance of the *International Shoe* standard is the general proposition that a state may dispense with in-state personal service on nonresident defendants in suits arising out of their activities in the state. The defendant's litigation related contacts may take the place of physical presence as the basis of jurisdiction. The announcement of alternative methods of meeting due process requirements, however, was not intended to abrogate those methods that have satisfied the requirements since *Pennoyer*. "[That which], in substance, has been immemorially the actual law of the land . . . [is] due process of law."[75] It is clear that the transient rule of in personam jurisdiction survived *International Shoe*.

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[69] *See supra* note 30 and accompanying text.

[70] *See supra* notes 51–56 and accompanying text.

[71] 495 U.S. at 619.

[72] *See supra* notes 28–31 and accompanying text (minimum contacts insures due process against nonresident "if he be not present within the territory of the forum").

[73] *See supra* notes 28–31 and accompanying text.

[74] 495 U.S. at 619.

[75] Hurtado v. California, 110 U.S. 516, 528–29 (1884).

E. Shaffer: *The Source of Divergence*

The primary source of disagreement concerning the continued constitutionality of the transient rule can be traced to *Shaffer v. Heitner*. It was in *Shaffer* that the Court announced that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[76] Upon this statement of the law, Burnham grounds his argument. In effect, Burnham argues that any remaining vestiges of *Pennoyer*'s transient jurisdiction rule were extinguished by the Court in *Shaffer*.[77] Burnham, joined by several lower court decisions and prominent commentators on the subject, argued that the *International Shoe* "minimum contacts" standard now constitutes the general rule governing the requirements of due process.[78] No court may exercise in personam jurisdiction over a nonresident defendant unless the defendant has certain minimum contacts with the forum so that the exercise of personal jurisdiction does not offend "traditional notions of fair play and substantial justice."[79] Given the misinterpretation of the *International Shoe* rule itself, it is not surprising that a subsequent decision based upon that rule would garner a similar misunderstanding and misapplication.

Scalia is careful to point out that *Shaffer*, like *International Shoe*, involved jurisdiction over an absent defendant, and it "stands for nothing more than the proposition that when the 'minimum contact' that is a substitute for physical presence consists of property ownership it must, like other minimum contacts, be related to the litigation."[80] Furthermore, the logic of *Shaffer*'s holding does not compel the conclusion that physically present nonresidents must be treated in the same manner as absent ones. The American tradition has treated the two classes of defendants differently, and it is unreasonable to read *Shaffer* as destroying the distinction.[81] *International Shoe* confined its "minimum contacts" requirement to situations in which the defendant was not served while present in the forum and nothing in *Shaffer* expands that requirement. Just as transient jurisdiction was exempted from the "minimum contacts" standard of *International Shoe*, it cannot be held to be incorporated into the standard by a subsequent decision based upon the general rule.[82]

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[76] 433 U.S. at 212. *See supra* notes 51–57 and accompanying text.

[77] Brief for Petitioner at 16–19, Burnham v. Superior Court of California, 495 U.S. 604 (1990).

[78] *See supra* notes 53–55 and accompanying text.

[79] *See supra* notes 30–38 and accompanying text.

[80] 495 U.S. at 620.

[81] *Id.* at 621.

[82] *Id.*

V. THE RULE OF *BURNHAM*

It is arguable that the controversy concerning the transient rule of personal jurisdiction is now moot after *Burnham*. The Court, although a plurality opinion, does not hedge when it states that transient personal jurisdiction is alive and well in the Court's due process decisions. Scalia argues convincingly that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of the American legal system. It follows that such a time-honored tradition comports with a system that defines due process as "traditional notions of fair play and substantial justice."[83]

As a result of *Burnham*, a state may exercise general in personam jurisdiction over a nonresident defendant who is personally served with process while physically present in the forum state without violating the Due Process Clause of the Fourteenth Amendment. As the title of this Note suggests, the question remains as to whether the *Burnham* decision is the "final word" in the transient jurisdiction debate. Is the historical rationale provided by Scalia as clear as his articulation suggests? It is arguable that the answer to this question is clearly in the negative considering the amount of scholarly attention the subject has received.[84]

The following section discusses the opinions offered by both Justice Scalia and Justice Brennan. Although the two justices arrived at the same result concerning transient jurisdiction, their opinions diverge as to the rationale that supports the rule. Justice Scalia points to the "historical pedigree" as a sufficient defense for the continuing validity of the transient rule. Justice Brennan, while agreeing that the Due Process Clause generally permits a state to exercise jurisdiction over the defendant who is personally served while voluntarily present in the forum, strongly disagrees that history alone provides a sufficient justification for the rule.

VI. THE *BURNHAM* OPINIONS

A. *Justice Scalia: The Preservation of Tradition*

Justice Scalia's rationale for the absolute constitutionality of the transient personal jurisdiction rule can be presented in concise form: "Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State."[85]

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[83] *Id.* at 618.

[84] *See supra* notes 1–5 and accompanying text.

[85] 495 U.S. at 610.

Scalia presents personal jurisdiction as a creature of history. According to Scalia, the courts of many states during the 19th and early 20th centuries firmly established that personal service upon the physically present defendant "sufficed to confer jurisdiction, without regard to whether the defendant was only briefly in the State."[86] Because the practice of transient jurisdiction comprises the legal tradition of American courts, and the practice has not been expressly abrogated by the Court, it continues to serve as the bedrock of due process with respect to personal jurisdiction.[87]

Within his opinion, Justice Scalia provides impressive evidence of the "historical pedigree" of the transient rule. Although Scalia's journey through the annals of the American legal tradition and the treatment of transient jurisdiction is factually correct, evidence does exist that the practice of transient jurisdiction did not garner the unquestionable support that Scalia suggests.[88] Nevertheless, Scalia takes a hard line on the subject and, in effect, holds that transient jurisdiction has been held to be due process in the past, it comports with due process today, and it will continue to be sufficient in the future. In that vein, Scalia declares that lower court decisions that have held against the constitutionality of transient jurisdiction should be dismissed as erroneous.[89]

B. *Justice Brennan: Questioning Tradition*

Although agreeing with Scalia in result, Justice Brennan is thoroughly unconvinced by Justice Scalia's shorthanded, "bright line" treatment of the transient jurisdiction issue. Brennan does not subscribe to the theory, espoused by Scalia, that the "historical pedigree" of a jurisdictional rule is the only factor that must be considered such that "traditional rules of jurisdiction are, ipso facto, forever constitutional."[90] The jurisprudence of personal jurisdiction and due process constitutes an area of law particularly inappropriate for the invocation of "bright line" tests. For Brennan, there are no hard and fast rules when due process is at issue.[91] Furthermore, *International Shoe* and *Shaffer* foreclose Justice Scalia's reliance on "historical pedigree" because it was with

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[86] *Id.* at 613.

[87] *Id.* at 615.

[88] For example, it has been suggested that until the late 19th century, American appellate courts rarely held transient service sufficient to confer jurisdiction as such. *See* Ehrenzweig, *supra* note 1, at 292. Furthermore, Justice Brennan points out that the transient rule did not receive "wide currency" in the United States until well after the *Pennoyer* decision. 495 U.S. at 635 (Brennan, J., concurring).

[89] 495 U.S. at 617.

[90] *Id.* at 629 (Brennan, J., concurring).

[91] *Id.*

these decisions that the court struck down the traditional "presence" requirement and quasi in rem procedures firmly entrenched in *Pennoyer*.[92]

Rejecting the reliance on history, Brennan suggests that the Court should make an "independent inquiry into the fairness of [a] prevailing in-state service rule"[93] to insure that the exercise of jurisdiction comports with "contemporary notions of due process."[94] Although history is relevant in providing notice to nonresidents voluntarily present in a particular state that they are subject to suit in the forum, history alone, argues Brennan, cannot serve as the beginning and the end of the inquiry.[95] The "historical pedigree" is but one factor in determining whether the jurisdiction rule comports with "contemporary" notions of fair play and substantial justice. Only those jurisdictional rules that comply with these "contemporary notions" constitute due process.[96]

In response, Justice Scalia concedes that the "reasonableness inquiry" suggested by Brennan must be utilized at the "margins" when states adopt "non-traditional" methods of obtaining personal jurisdiction. However, such an inquiry is not required with respect to jurisdiction via in-state service because physical presence is considered the "very baseline of reasonableness."[97]

Given the fact that in-state service of process upon a physically present defendant appears, after *Burnham*, to be sufficient to confer jurisdiction in all cases, the ramifications of this rule in practice become the next logical subject for debate. How will courts deal with the inevitable unfair results of such a "catch-as-you-can" method of establishing personal jurisdiction? As the fairness and reasonableness of the rule come into increasing question, will the Court be forced to alter the rule to comply with "contemporary" notions of due process? In other words, is *Burnham* the "final word" on transient personal jurisdiction? The following sections provide some insight into these and related questions.

VII. TRANSIENT PERSONAL JURISDICTION AND DUE PROCESS OF LAW

A. *Fairness and Reasonableness*

Given the conclusion that the exercise of personal jurisdiction based solely upon in-state service comports with due process, the fairness and reasonableness of such a result in practice remains an issue for debate.[98] At what point should a court turn the focus of the jurisdiction question away from

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[92] *Id.* at 630.

[93] *Id.* at 629.

[94] *Id.* at 633.

[95] *Id.* at 635.

[96] *Id.* at 630.

[97] *Id.* at 627.

[98] *See supra* notes 1–5 and accompanying text.

strict adherence to the Fourteenth Amendment to focus upon the issue of fairness to the nonresident defendant? Is it likely that due process and fairness will become competing values?

As with any measurement of fairness, an estimate as to the fairness element of a given exercise of transient jurisdiction depends upon the point of view of the person charged with making such an estimate. From the nonresident defendant's perspective, it appears unequivocally unfair to be forced to defend in a forum with which the nonresident has no contacts other than being served with process during a fleeting "presence" in the jurisdiction. By simply inserting a few hundred miles between the forum and the defendant's domicile, one can markedly enhance the defendant's feeling of unfair treatment.

An illustration of the possible fairness issues inherent in the transient jurisdiction rule further illuminates the nonresident defendant's predicament. Assume that *D* is a life-long resident of Anchorage, Alaska. *D* has never had cause to leave the State of Alaska because her struggling oil refinery business requires constant attention. Assume further that the proverbial "chance of a lifetime" comes *D*'s way. A buyer from El Petro, a producer of petroleum-based solvents located in Caracas, Venezuela, has expressed an interest in purchasing large quantities of *D*'s refined crude oil. The buyer insists that *D* travel to Caracas to close the deal. Reasoning that such a deal could breathe new life into her refinery's plummeting sales figures, *D* departs for Caracas to meet with the buyer.

D's flight itinerary requires a fifteen minute stop over at Miami International Airport. *D* assumes that the stop over will merely constitute a fifteen minute delay in an otherwise advantageous journey. Unfortunately, *D*'s assumption is entirely incorrect. While the jet is refueling on the airport tarmac, *D* is personally served by a Dade County deputy sheriff with a summons and complaint to appear in county court to answer a wrongful discharge complaint. The complaint was filed by *E*, a disgruntled former employee who has, within the last six months, relocated from Anchorage to Miami.[99] As a result, *D*'s fifteen minute "presence" in the State of Florida will consume a disproportionate share of her time and resources in the ensuing months.

Aside from the obvious inequities of *D*'s plight, the typical nonresident defendant is faced with a Hobson's choice between travelling many miles to a faraway forum and expending an inordinate amount of time and money in defending the action, or, in the alternative, suffering a default judgment.[100] The mere fact that a defendant is forced to defend in a foreign jurisdiction with

[99] *See generally* Hanson v. Denckla, 357 U.S. 235 (1958); Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959) (nonresident defendant served while flying over jurisdiction in commercial aircraft).

[100] Posnak, *supra* note 4, at 744.

which the nonresident has little or no contacts results in a measure of unfairness regardless of the forum's geographic location.

Although analogous to unfairness, unreasonable results of the transient rule are also a concern among commentators.[101] Professor Matz recently described the unreasonableness inherent in the transient rule. Among the effects of requiring nonresidents to defend in remote forums are: (1) the transient forum may adopt a choice of law rule that would be particularly or uniquely unfair to the defendant; (2) defendants may be fraudulently induced to enter the forum state;[102] (3) the state asserting jurisdiction may have no interest in the outcome of the litigation;[103] and (4) the benefits that nonresidents derive from a transient presence in the forum state are significantly outweighed by the burdens of defending in the forum.[104]

In response, those who advance the virtues of the transient rule testify to the reasonableness of the doctrine. Examples of often recited reasonable results include: (1) the transient jurisdiction doctrine is a predictable rule upon which all parties can rely; (2) being served with process and becoming subject to the jurisdiction of the forum is a justifiable risk that nonresidents assume upon entering the state; (3) nonresidents derive benefit from the protection of the laws of the forum while present in the state, and thus, should be subject to the jurisdiction of those laws;[105] and (4) in the majority of cases, the nonresident defendant will have at least "minimum contacts" with the state in which the defendant is personally served without resort to service as the sole basis for jurisdiction.[106]

Insight into the persuasiveness of the arguments expounding the reasonableness of the transient rule can be gained by re-examining the plight of *D*, our hypothetical nonresident defendant. Perhaps the most persuasive of the arguments endorsing the reasonableness of the transient rule is the benefit/burden analysis. The benefit/burden rationale maintains that because the nonresident derives benefits in the form of police, fire, and related protection while present in the state, it is reasonable that the nonresident suffer the burden

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[101] *See supra* notes 1–5 and accompanying text.

[102] A general rule of due process within the transient jurisdiction doctrine requires that the defendant be voluntarily within the forum. Concerning the effects of fraudulently inducing the nonresident to enter the forum, *see infra* notes 114–16 and accompanying text.

[103] The lack of local interest in the outcome of the litigation takes on a special significance with respect to the doctrine of forum non conveniens. *See infra* notes 121–24 and accompanying text.

[104] *See* Matz, *supra* note 5, at 700.

[105] *See infra* note 106 and accompanying text.

[106] *See* Bernstine, *supra* note 4, at 61.

of becoming subject to the jurisdiction of the state's judicial system.[107] As with all benefit/burden analysis, a proper judgment can only be derived by a process of weighing the relative benefits and burdens. Presumably, the exercise of personal jurisdiction over the nonresident defendant will appear reasonable only when the benefits equal or exceed the burdens. Returning to *D*, one can scarcely reconcile the benefits *D* derived during a fifteen minute presence at a Florida airport with the enormous burdens *D* will encounter in defending a suit in a forum thousands of miles away from her Alaskan domicile. Therefore, it would appear that the benefit/burden rationale would not yield a reasonable result in our hypothetical scenario.

Further application of the arguments supporting the reasonableness of the transient rule to our hypothetical fact pattern yield similarly unreasonable results. It is difficult to argue with any conviction that *D* assumed a justifiable risk of being served with process and becoming subject to the jurisdiction of Florida courts by making a stop-over in a Florida airport, a decision over which *D* had little or no control. A more convincing proposition is that *D* was not voluntarily present in the state when served and to exercise jurisdiction over her would be unreasonable even under the *Burnham* rule.[108] Furthermore, it is probable that the State of Florida would possess little more than a negligible interest in the outcome of the litigation involving a tortious injury caused in Alaska and filed by a plaintiff who has himself been present within the state a mere six months. In fairness, however, it must be recognized that our hypothetical exercise of transient jurisdiction is based upon an extraordinary fact pattern. Arguably, the majority of the cases would not involve such manifest unfairness and the exercise of transient personal jurisdiction would be, on most accounts, reasonable. Nevertheless, by examining the worst-case scenarios, one begins to recognize the potential problems inherent in the transient rule.

With respect to the fairness and reasonableness of the exercise of transient jurisdiction, convincing arguments can be made on both sides of the issue. The conflicts on the issue result in large part from one's point of view. Nonresidents find the rule inherently unfair and unreasonable. Predictably, plaintiffs espouse the virtues of the rule. Most courts, citing both precedent and policy, find at the very least the rule comports with due process, and, in practice, results in fair and reasonable outcomes in general.

The following sections suggest methods for mitigating the possible unfair and unreasonable results of the transient rule. First, a survey of the remaining due process challenges to the exercise of transient jurisdiction is provided.

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[107] Justice Brennan discusses the importance of the benefit/burden analogy with respect to "contemporary notions" of due process and the transient rule. *See* 495 U.S. at 638 (Brennan, J., concurring).

[108] *See infra* notes 113-15 and accompanying text (voluntary presence requirement).

Second, the common law doctrine of forum non conveniens is introduced as an increasingly powerful device for insuring fair and reasonable results after *Burnham*. Finally, given the expanded role of the doctrine of forum non conveniens, the final section advances the proposition that *Burnham* is not the Court's "last word" respecting transient personal jurisdiction.

B. *Enduring* Burnham: *The Technical Requirements of Transient Personal Jurisdiction*

Following the Court's decision in *Burnham*, both nonresident defendants and their attorneys must confront the transient jurisdiction rule as the undisputed law in American jurisdictions. Faced with this reality, nonresident defendants must construct arguments to mitigate the effects of the rule. The most elementary challenges to the exercise of personal jurisdiction are based solely upon in-state service and can be derived from assessing the technical, or due process, requirements of the rule. These requirements include: (1) proper service of process; (2) personal, "in-hand" service; and (3) voluntary presence in the state.

An unyielding prerequisite of obtaining jurisdiction based solely on in-state service is proper service of process. Due process requires that the defendant be given adequate notice and an opportunity to be heard in the cause filed against her.[109] Traditionally, in personam jurisdiction required that the defendant be personally served. As unscrupulous defendants began to routinely thwart plaintiffs by avoiding personal service in the jurisdiction, states began to create methods of substitute service of process, including service by mail and leaving process papers at the defendant's dwelling.[110] However, the exercise of jurisdiction based *solely* on in-state service of process requires that the defendant be personally served while present in the state. The various forms of substitute service developed by states after *Pennoyer*, although adequate for jurisdiction based on more than mere presence, will not satisfy the due process requirement for purposes of transient jurisdiction. The transient defendant must be personally served, *in-hand*, while present in the state. If the service of process does not comply with this requirement, the exercise of personal jurisdiction over the nonresident defendant will violate due process. Therefore, an attorney representing the nonresident defendant would be well advised to scrutinize the mechanics involved in service of process upon his or her client.

Once the nonresident defendant's counsel has determined that the client has been personally served with proper notice while present within the state, a series of other "mechanical" questions must be answered. The attorney must examine the circumstances surrounding the nonresident's presence in the state.

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[109] CASAD, *supra* note 4, at § 2.03.

[110] *See* Greene v. Lindsey, 456 U.S. 444 (1982).

For example, why was the client present in the state at the time process was served? Was the client voluntarily present in the state, or was the client coaxed or persuaded into entering the state? If the client was so persuaded, was such persuasion fraudulent? If the nonresident's counsel is inclined to challenge the state's exercise of transient personal jurisdiction over his or her client, the answers to these questions become critical.

American courts have developed several doctrines of self-restraint concerning the exercise of personal jurisdiction. For purposes of this section concerning the technical requirements of the transient rule, the self-restraining doctrines respecting service of process are of central concern. One example is the doctrine of immunity from service of process. A nonresident who is present within the forum state for the purpose of participating in legal proceedings enjoys a general immunity from the effective service of process in other causes of action for a reasonable time before and after the actual time of the proceedings.[111] The immunity applies not only to parties, but also to witnesses and attorneys.[112] Almost all American jurisdictions recognize the immunity, and the principle is sometimes embodied in statutes.[113] Therefore, if the nonresident is present in the forum for purposes of attending another proceeding, service of process during the reasonable immunity period would be ineffective and, as a consequence, the court would be unable to exercise transient jurisdiction over the nonresident.

If counsel for a nonresident defendant cannot take refuge in the immunity from service doctrine in challenging transient jurisdiction, another judicial self-restraint doctrine may be available. If the plaintiff has induced the nonresident into coming within the state for the purpose of serving him there, the service of

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[111] CASAD, *supra* note 4, at §1.06; JAMES & HAZARD, CIVIL PROCEDURE, § 2.28 (3d ed. 1985); Lamb v. Schmitt, 285 U.S. 222 (1932); Stewart v. Ramsay, 242 U.S. 128 (1916). Professor Casad points to two policy rationales for the immunity from service doctrine:

> Arrest of a party, witness, judge, juror, or attorney involved in an ongoing lawsuit would seriously disrupt the proceedings, and so the common law granted those participants immunity from service in connection with other actions while they were so engaged. The principal justification for the doctrine was the need to protect the court from interference. [An additional justification was the] need to encourage the presence in the territory of persons necessary to the trial of a lawsuit whose attendance could not be compelled.

CASAD, *supra* note 4, at § 1.06.

[112] *See generally*, Stewart v. Ramsay, 242 U.S. 128 (1916); Crusco v. Strunk Steel Co., 74 A.2d 142, 143 (Pa. 1950).

[113] CASAD, *supra* note 4, at § 1.06.

process may be avoided.[114] After *Burnham*, it is quite possible that plaintiffs will be more inclined to rely upon in-state service as a method of obtaining jurisdiction over nonresident defendants because the transient method incontrovertibly comports with due process.[115] Therefore, as the prospect of personally serving the nonresident in-state becomes more attractive, the incentive for "persuading" the nonresident to enter the forum state is increased. If, however, the defendant challenges the exercise of transient jurisdiction by establishing that the plaintiff has fraudulently induced the defendant into entering the state, not only will the service of process be ineffective, but the court will not have in personam jurisdiction over the defendant as a result.[116]

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[114] *See* Wyman v. Newhouse, 93 F.2d 313 (2d Cir. 1937); Western States Refining Co. v. Berry, 313 P.2d 480 (Utah 1957); Economy Elec. Co. v. Automatice Elec. Power & Light Plant, 118 S.E. 3, 4 (S.C. 1923); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 82.

[115] Professor Casad notes a similar phenomenon after *Pennoyer*:

> Under the traditional view of jurisdiction . . . physical presence of the defendant within the territory of the forum was regarded as a sufficient basis for personal jurisdiction. This fact was sometimes exploited by plaintiffs who would use reprehensible measures to induce the defendant to enter the forum territory. Sometimes plaintiffs would lure the defendants into the territory by fraudulent representations or by tricks or artifice. To nullify the incentives for employing such devices, the courts developed a doctrine to avoid jurisdiction in cases where personal service on the defendant was obtained through force or fraud.

CASAD, *supra* note 4, at § 1.05. For further examples of the fraud doctrine, see Blandin v. Ostrander, 239 F. 700 (2d Cir. 1917); Mallin v. Sunshine Kitchens, Inc., 314 So.2d 203 (Fla. Dist. Ct. App. 1975); Phares v. Nutter, 609 P.2d 561 (Ariz. 1980); Annotation, *Attack on Personal Service as Having Been Obtained by Fraud or Trickery*, 98 A.L.R.2d 551 (1964).

[116] Professor Casad has traced the development of the fraud doctrine and suggests that two different rules were recognized. Some courts viewed the use of force or fraud for purposes of service of process as destroying jurisdiction. Without personal jurisdiction, any resulting judgment would be regarded as void and could be collaterally attacked by the defendant. Wyman v. Newhouse, 93 F.2d 313 (2d Cir. 1937). Other courts, however, viewed the effect of such fraudulent exploits, not as destroying jurisdiction, but as providing grounds for the court to decline the exercise of transient jurisdiction over the defendant:

> If the defendant objected to the service and the exercise of jurisdiction based upon it, the court would quash the service and dismiss the action against the defendant. If the defendant failed to object, however, and a default judgment was rendered, the judgment would be valid unless set aside or reversed through a direct attack.

CASAD, *supra* note 4, at §1.06.

Returning to the quandary of *D*, our hypothetical nonresident defendant, it appears that neither the "mechanical," due process requirements of transient jurisdiction, nor the aforementioned self-restraint doctrines will be of any assistance. *D*'s predicament is not unlike that of the average nonresident challenging the exercise of transient jurisdiction. Like *D*, most nonresidents will be personally served with adequate notice while present in the state. Furthermore, the majority of nonresidents will be unable to take refuge in the immunity from service shelter, if only for the fact that most plaintiffs' attorneys will be aware of immunity when tracking down the nonresident defendant. Additionally, only in the exceptional cases will the defendant be able to avoid jurisdiction based upon the fraudulent inducement of the plaintiff. Finally, any attacks upon the constitutionality of the transient rule have been, at least for the present time, foreclosed by *Burnham*. Therefore, *D* and other similarly situated nonresident defendants must look elsewhere to successfully attack the exercise of transient jurisdiction.

The following section examines the most powerful judicial self-restraint doctrine available to the nonresident defendant subjected to the harsh consequences of the transient jurisdiction rule. Nonresidents unable to attack the exercise of jurisdiction itself may be able to attack the plaintiff's choice of forum under the doctrine of forum non conveniens. After *Burnham*, it is likely that the forum non conveniens doctrine will assume the role that the "minimum contacts" standard played before *Burnham*.

C. *Forum Non Conveniens: The Exception or the Rule*

The common law doctrine of forum non conveniens asserts the discretionary power of a court to decline to exercise the jurisdiction it possesses in a given case when the court determines that the plaintiff's chosen forum would be seriously inconvenient to the defendant.[117] In the early twentieth century, the doctrine was inhospitably received by American courts whose decisions reflected the view that courts have a duty to exercise jurisdiction whenever it is properly acquired.[118] Forum non conveniens began to enjoy general acceptance after its adoption by the U.S. Supreme Court in *Gulf Oil Corp. v. Gilbert*.[119] Today, *Gulf Oil* is regarded as the leading case on the doctrine and serves as the standard to which judges look for guidance in exercising their discretion in ruling on a defendant's motion to dismiss due to

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[117] Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981); Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929); Edward L. Barrett, *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380 (1947).

[118] Barrett, *supra* note 117, at 394–97.

[119] 330 U.S. 501 (1947). In stating the general rule, the court held that "[t]he principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Id.* at 507.

inconvenient forum.[120] As a general proposition, the courts of one state may not transfer cases to courts of another state. Therefore, dismissal is the only device for implementing forum non conveniens in the typical transient jurisdiction situation.[121]

In *Gulf Oil*, the Court spelled out the multitude of factors to be weighed in determining whether the plaintiff's chosen forum is unreasonably inconvenient. The Court divided the factors into those concerning the private interests of the litigant and factors related to the interests of the public.[122] Those considerations grouped under the private interests of the litigants include: (1) the accessibility to sources of proof; (2) the availability of compulsory process to subpoena unwilling witnesses; (3) the cost of obtaining willing witnesses; (4) the feasibility of jury views when appropriate to the litigation; (5) the practical problems that make a trial expensive, complicated, and burdensome; and (6) the enforceability of a judgment if one is obtained. Among the factors of public interest to be considered are: (1) the administrative difficulties of congested litigation centers; (2) imposing the burden of jury duty upon the people of a community which has no relation to the litigation; (3) the local interest in having localized controversies decided at home; and (4) conflict of laws

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[120] Although not generally so limited, forum non conveniens is generally invoked on the defendant's motions. Because plaintiffs are free to choose the jurisdiction in which to file an action, they usually have no incentive to challenge the appropriateness of the forum. Some states, however, hold that issue may be addressed on the court's motion. CASAD, *supra* note 4, at §1.04.

[121] JAMES & HAZARD, *supra* note 111, at 107. Contrasted with the doctrine of forum non conveniens is the venue principle. Most state courts operate under venue statutes that direct the litigation to a court within the state where the case can be litigated most conveniently and efficiently. Professor Casad has noted that "no procedure presently exists for transferring the action from one state court to another; if the alternative forum is in another state, the action is normally dismissed in the first court, leaving the plaintiff to commence a new suit in another state." CASAD, *supra* note 4, at §1.04. For an examination of the procedures for protecting the interests of the plaintiff on dismissal, *see infra* note 125 and accompanying text.

[122] Professors James and Hazard agree that the common law doctrine of forum non conveniens represents two strains of policy:

> One is the state's interest in protecting its citizens and taxpayers from the undue expense and congestion that may flow from burdening its courts with litigation having no connection with the state. The other is the parties' interest in having litigation between them processed conveniently and in a way most likely to yield a just result.

JAMES & HAZARD, *supra* note 111, at 105.

problems that arise when a court is forced to apply the law of another state.[123] The *Gulf Oil* Court cautioned lower courts that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[124]

In the typical transient jurisdiction case, the plaintiff will choose a forum within a state where the nonresident defendant can be easily served. As was presented in our hypothetical illustration, the plaintiff will often choose to "catch" the nonresident in the plaintiff's state of residence. By consenting to the jurisdiction of another state, however, the plaintiff is capable of serving the defendant in a most inconvenient locale.[125] In either circumstance, the doctrine of forum non conveniens can serve as a powerful tool to counter the plaintiff's choice of an inconvenient forum. Even in situations in which the *Gulf Oil* factors weigh heavily in favor of the defendant's motion to dismiss, the plaintiff is not without recourse. Courts have traditionally protected the plaintiff against the running of statutes of limitations and against countering personal jurisdiction objections in the new court by conditioning the dismissal upon the defendant's waiver of those defenses.[126]

Returning to *D*, our nonresident defendant, a clear understanding of the forum non conveniens doctrine can be obtained by applying the aforementioned rules to *D*'s predicament. As with many instances of transient jurisdiction, the cause of action in *D*'s case arose outside the forum state. All of the facts and circumstances surrounding *E*'s tort action for wrongful discharge occurred in Alaska while *E* was an Alaska resident. Presumably, all evidence of the discharge and any necessary witnesses will also be located thousands of miles from the forum. As a result, the "accessibility to sources of proof" factor will weigh heavily in favor of *D*'s motion to dismiss. In addition, the costs of trying

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[123] *Gulf Oil*, 330 U.S. at 512. *But see* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) (choice of law should not be given weight). An important consideration that was not cited by the *Gulf Oil* Court is the availability of an alternative forum. Most courts that recognize forum non conveniens in appropriate cases will not exercise their discretion when dismissal will deprive the plaintiff of the only available forum or when there is substantial doubt whether any other forum is practically available. *See* JAMES & HAZARD, *supra* note 111, at 107. *See also* Note, *Requirement of a Second Forum for Application of Forum Non Conveniens*, 43 MINN. L. REV. 1199 (1959).

[124] *Gulf Oil*, 330 U.S. at 517.

[125] JAMES & HAZARD, *supra* note 111, at § 2.22.

[126] *See, e.g.*, Miskow v. Boeing Co., 664 F.2d 205 (9th Cir. 1981); Mizokami Bros. of Ariz. v. Mobay Chem. Corp., 660 F.2d 712 (8th Cir. 1981); Adriana Dev. Corp. v. Gaspar, 81 A.D.2d 235 (1981); Harrsion v. Wyeth Lab. Div. of Am. Home Prods. Corp., 510 F. Supp. 1 (E.D. Pa. 1980). Other alternatives are available to the court seeking to provide some protection to the plaintiff. For example, some courts, instead of dismissing, stay the current proceeding until the new action is commenced in the alternative forum. CASAD, *supra* note 4, at § 1.04; *see, e.g.*, Vargas v. A.H. Bull S.S. Co., 131 A.2d 39, *aff'd*, 135 A.2d 857 (N.J. 1957); Archibald v. Cinerama Hotels, 544 P.2d 947 (Cal. 1976).

a "transient" action in Florida in terms of legal fees, transportation, discovery, lost time, and related expenses will be unreasonably exorbitant. Furthermore, the interests of the State of Florida in the outcome of the litigation are de minimis.[127] Because *E*'s cause of action arose within, and substantially relates to, the State of Alaska, the state courts of Florida would be required to apply Alaska law to the substantive issues of the case.[128]

Weighing both the private interests of the parties and the public interest of the forum state in the litigation, it appears that our hypothetical transient jurisdiction scenario is a prime candidate for dismissal upon *D*'s forum non conveniens motion. It is probable that the Florida court would exercise its discretion and refuse to exercise its otherwise valid transient jurisdiction over *D*. Provided an alternative forum is available, the court would dismiss *E*'s cause of action subject to *D*'s waiver of any jurisdictional or statute of limitations defenses. *E* would then be free to pursue his cause of action against *D* in a more appropriate forum.

At this point, one must note the ironic similarities between the balancing that accompanies a motion for dismissal due to forum non conveniens and the "minimum contacts" standard of *International Shoe*.[129] As the *Burnham* Court made great strides toward unequivocal approval of transient personal jurisdiction, will the doctrine of forum non conveniens succeed where the "minimum contacts" standard failed in uprooting the rule? As one begins to turn one's focus away from the constitutional considerations of the transient rule and, instead, to focus upon the practical fairness and reasonableness of the rule, one realizes that forum non conveniens could serve to destroy the foundation that the *Burnham* Court sought to preserve. As fairness and due process become competing values under the transient rule, will courts turn to discretionary doctrines such as forum non conveniens and refuse to exercise what the *Burnham* decision unabashedly announces as being "among the most firmly established principles of personal jurisdiction in American tradition?"[130]

As the inequities inherent in the transient rule become more prevalent because disgruntled plaintiffs increasingly take advantage of the rule to "catch" unwary nonresidents, defendants will likewise come to rely upon the doctrine of forum non conveniens for relief.[131] State court judges will be forced to

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[127] *Gulf Oil*, 330 U.S. at 508.

[128] *See* Wal-Mart Stores, Inc. v. Budget Rent-A-Car Sys., 567 So. 2d 918 (Fla. Dist. Ct. App. 1990); Barker v. Anderson, 546 So. 2d 449 (Fla. Dist. Ct. App. 1989); RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §§ 145–46 (1969).

[129] *See supra* notes 31–35 and accompanying text. *Cf. Gulf Oil*, 330 U.S. at 501 (1947).

[130] *See supra* note 85 and accompanying text.

[131] Such was the case even after *Pennoyer*:

entertain an escalating number of nonresident defendants' motions to dismiss. It is likely that an entire subclass of forum non conveniens jurisprudence will develop as courts continue in their effort to sort out the harsh results of the *Burnham* rule. Courts will be continually called upon to exercise their discretion by nonresidents who rely not upon the Court's decisions in *International Shoe* or *Shaffer*, but upon the common law doctrine of forum non conveniens. Judges will no longer be able to look to the due process decisions of the Court for guidance because *Burnham* is the rule.[132] The question will not be one of personal jurisdiction, but one of equity.

The following section continues the examination of the role that forum non conveniens will play in post-*Burnham* personal jurisdiction jurisprudence. In addition, several questions that remain unanswered after the *Burnham* decision are probed. Finally, the proposition is advanced that *Burnham* is *not* the Court's last word on transient personal jurisdiction.

VIII. THE FINAL WORD?

After *Burnham*, it is probable that the doctrine of forum non conveniens will assume the position once held by *International Shoe* and *Shaffer* among the critics of transient jurisdiction. As mentioned above, the factors utilized by courts with respect to forum non conveniens balancing are remarkably similar to the factors relevant to "minimum contacts" analysis. It is ironic that the common law doctrine of forum non conveniens will allow a court to do just what the *Burnham* decision will not; namely, to refuse to exercise personal jurisdiction based upon inadequate contacts with the forum state. The *Burnham* decision announced that in-state service of process upon a nonresident defendant is sufficient to confer jurisdiction regardless of the quantity or quality of the defendant's contacts with the state.[133] The doctrine of forum non conveniens allows a court, within its discretion, to refuse to exercise such jurisdiction when the defendant's contacts with the forum state are so attenuated that forcing the nonresident to defend in the forum would be unreasonably burdensome. Therefore, although the court is prohibited from relying upon

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> [I]f the plaintiff was thus to be compensated by the new transient rule for some inconvenience caused to him by the *Pennoyer* requirement, the doctrine of the inconvenient forum was in turn resorted to in order to give the defendant protection against some of the hardship this rule caused him. The common law and common sense jurisdiction of the *forum conveniens* yielded to a dogmatic rule of personal service precariously balanced by a doctrine of forum *non* conveniens.

Ehrenzweig, *supra* note 1, at 292.

[132] Of course, judges will then turn to *Gulf Oil* for guidance in exercising their discretion whether to decline jurisdiction plainly established under *Burnham*.

[133] Burnham v. Superior Court of Cal., 495 U.S. 604 (1990).

"minimum contacts" analysis when ruling upon the validity of transient jurisdiction, the court is *required* to rely upon such contacts when ruling upon the defendant's forum non conveniens motion.

The dichotomy is further complicated by the fact that forum non conveniens is a doctrine of judicial discretion. On appeal, a court's denial of personal jurisdiction is an issue of law subject to full review by the appellate court. Conversely, a court's decision to dismiss due to inconvenient forum is discretionary and, as such, may only be reversed upon a showing of abuse of discretion.[134] Reviewing courts are loath to question the discretion of the trial courts and will do so only in cases of clear abuse. Therefore, the court's refusal to exercise otherwise appropriate jurisdiction is given more protection from appellate scrutiny than the court's ability to exercise jurisdiction in the first place.

The proposition that judges will freely exercise their discretion and grant dismissals based upon forum non conveniens when presented with the gross inequities of the transient rule negates most of the positive elements of the rule. The virtue of the transient rule most often cited by its supporters is its stability. The fact that personal in-state service confers jurisdiction over the defendant constitutes a rule upon which all parties can rely. By injecting the doctrine of forum non conveniens into the formula, however, this stable and uncontroverted rule is transformed into a maxim dictated by the discretion of a trial judge. By shifting the focus away from precedent and toward judicial discretion, the doctrine of forum non conveniens is capable of rendering the rule of transient jurisdiction as uncertain as the "minimum contacts" analysis the *Burnham* Court sought to preclude.[135]

With the increased prospects for circumventing the transient rule offered by forum non conveniens, one must ask why the *Burnham* Court endorsed the rule at all? Would it not be more efficient for the trial court to analyze the defendant's contacts with the forum before establishing jurisdiction rather than reviewing those contacts in declining to exercise a possessed jurisdiction? Should a trial court hold such power guided only by a judge's sense of equity and a laundry list of obscure factors provided in *Gulf Oil*? Justice Scalia's answer is that the traditions of American law, predating *Pennoyer*, and the due process decisions of the Supreme Court mandate such a dilemma.

The question left unanswered by the *Burnham* Court serves as the focus of this Note. Is *Burnham* the Court's final word on the rule of transient personal jurisdiction? Given the possibility of unreasonable results under the rule illustrated by *D*'s hypothetical plight, the increasing reliance upon the doctrine of forum non conveniens as a counterbalance, and the Court's progression of personal jurisdiction decisions, it is likely that the Court will be forced to re-

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134 *See* JAMES & HAZARD, *supra* note 111, at § 12.4.

135 *See supra* notes 85–89 and accompanying text.

evaluate transient jurisdiction in the future. As the unreasonable outcomes of the transient rule become more prevalent, due process and fairness to the nonresident defendant will become competing considerations. Although, after *Burnham*, a trial court must recognize that transient jurisdiction comports with due process, the court may side with fairness to the defendant and refuse to exercise such jurisdiction. Professor Ehrenzweig prophesied to that effect:

> Once [the doctrine] has been deprived of its vitality either by a decision overruling it or by the continuing erosion by exceptions, the primary reason for the continued existence of the transient rule will have disappeared. *Forum non conveniens*, which now allows discretionary refusal to "take" existing jurisdiction, may then assume the positive function of identifying the *forum conveniens* in terms of substantial contacts such as the plaintiff's residence, the origin of the cause of action or the presence of property.[136]

IX. CONCLUSION

Following the *Burnham* Court's announcement that transient jurisdiction comports with due process in all respects, it is likely that debate concerning the rule will turn away from its constitutionality and toward its effects. As the inequities of the rule become more widespread, state courts will begin to exercise their discretion via common law doctrines such as forum non conveniens to protect the nonresident defendant. Additionally, astute attorneys will formulate increasingly creative challenges to the application of the rule. Whether the Court will be called upon to overrule the transient rule depends in large part upon the results under the rule in the aftermath of *Burnham*. Relying upon the "historical pedigree" provided by Scalia, it is apparent the rule has been valid for many decades and will presumably remain so in the near future. The willingness of the Court to abrogate the rule in a future decision as no longer complying with "traditional notions of fair play and substantial justice" may be foreshadowed by Justice Brennan's concurrence:

> [The fact] that we were willing in *Shaffer* to examine anew the appropriateness of the quasi in rem rule—until that time dutifully accepted by American courts for at least a century—demonstrates that we did not believe that the "pedigree" of a jurisdictional practice was dispositive in deciding whether it was consistent with due process. . . . If we could discard an "ancient form without substantial modern justification" in *Shaffer*, we can do so again.[137]

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[136] Ehrenzweig, *supra* note 1, at 312.

[137] 495 U.S. at 630–31 (Brennan, J., concurring). Indeed, Justice Scalia was also open to the possibility of abrogating the transient rule in the future: "Nothing we say today prevents individual states from limiting or entirely abandoning the in-state service basis of jurisdiction." *Id.* at 627.